

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al.,

Plaintiff,

v.

HEBERT CONSTRUCTION, INC., et al.,

Defendants.

No. C05-0388-TSZ

**DECLARATION OF DOUGLAS WEIGEL IN
SUPPORT OF ADMIRAL'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

ADMIRAL INSURANCE COMPANY,

Third Party Plaintiff,

v.

SAFECO INSURANCE COMPANY, et
al.,

Third Party Defendant.

I, Douglas Weigel, declare and state as follows:

1. I was the attorney of record for Meadow Valley LLC in the underlying action. I am over the age of 18 and competent to testify to the matters herein. I make this Declaration based upon personal knowledge.

DECLARATION OF DOUGLAS WEIGEL- 1
(No. C05-0388-TSZ)

JACKSON & WALLACE
1201 Third Avenue, Suite 3080
Seattle, WA 98101
(206) 386-0214

3. Attached hereto as Exhibit 2 is a true and correct copy of a letter I sent to American Economy Insurance Company dated January 7, 2005.

I declare under penalty of perjury pursuant to the laws of the State of Washington the foregoing is true and correct to the best of my knowledge and belief.

SIGNED at Seattle, Washington this 18th day of May, 2006.

D. W. E.
Douglas Weigel

JACKSON & WALLACE
1201 Third Avenue, Suite 3080
Seattle, WA 98101
(206) 386-0214

Exhibit 1



RECEIVED ALP
OCT 28 2004

AMERICAN ECONOMY INSURANCE COMPANY

FLOYD & PFLUEGER, P.S.

Special Commercial Liability Claims
PO Box 34700
Seattle, WA 98124

Phone: (800) 545-2271 x67893
Direct dial: (425) 376-7893
Fax: (425) 376-7900
Email: tamdra@safeco.com

October 24, 2004

Douglas Weigel
Floyd & Pflueger
300 Trianon Building
2505 Third Ave
Seattle, WA 98121

Re: Meadow Valley HOA v. Meadow Valley LLC v. Hebert Construction
King County Cause NO. 03-2-33931-8KNT

Our Insured: Interior Motives, Inc
Policy # 02BO781919
Claim No.: 7406 2315 2015
Your client: Meadow Valley, LLC

RESPONSE TO TENDER OF DEFENSE

Confidential, Privileged and Protected Pursuant to ER 408

Dear Mr. Weigel,

We are in receipt of your letter dated October 14, 2004 tendering the defense and indemnity of your client to our insured, Interior Motives. We have reviewed the documentation you have provided and the policy of insurance provided to our insured, and provide you with our findings below.

A review of the policy provided to our insured reveals that American Economy Insurance Company provided a Commercial General Liability policy to Interior Motives from 06/24/1999 to 06/24/2004. While we rely upon the entire contract when determining coverage matters; the following coverage forms are applicable to this coverage analysis:

06/24/99 to 06/24/00: BP0006 0689 BUSINESSOWNERS LIABILITY COVERAGE FORM;
06/24/00 to 06/24/01: BP0006 0689 BUSINESSOWNERS LIABILITY COVERAGE FORM;
06/24/01 to 06/24/02: BP0006 0197 BUSINESSOWNERS LIABILITY COVERAGE FORM;
BP0009 0197 BUSINESSOWNERS COMMON POLICY CONDITIONS,
BP7032 1299 ADDITIONAL INSURED-OWNERS, LESSEES OR
CONTRACTORS, and BP 7057 1097 ADDITIONAL INSURED-
DESIGNATED PERSON OR ORGANIZATION.
06/24/02 to 06/24/03: BP0006 0197 BUSINESSOWNERS LIABILITY COVERAGE FORM;
BP0009 0197 BUSINESSOWNERS COMMON POLICY CONDITIONS,
BP7032 1299 ADDITIONAL INSURED-OWNERS, LESSEES OR
CONTRACTORS, and BP 7057 1097 ADDITIONAL INSURED-

Douglas Weigel
October 24, 2004
Page 2

DESIGNATED PERSON OR ORGANIZATION.

06/24/03 to 06/24/04: BP0006 0197 BUSINESSOWNERS LIABILITY COVERAGE FORM;
BP0009 0197 BUSINESSOWNERS COMMON POLICY CONDITIONS,
BP7032 1299 ADDITIONAL INSURED-OWNERS, LESSEES OR
CONTRACTORS, and BP 7057 1097 ADDITIONAL INSURED-
DESIGNATED PERSON OR ORGANIZATION.

Specimen copies of these forms are enclosed for your review.

Addressing the coverage for policy years 06/24/99 to 06/24/00 and 06/24/00 to 06/24/01 I refer you to policy form BP 0006 0689 Businessowners Liability Coverage Form where it states in pertinent part:

The word insured means any person or organization qualifying as such under SECTION C WHO IS AN INSURED.

A. COVERAGES

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies.

I now refer you to page 7 Section C Who is an Insured where it reads in pertinent part:

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.
- c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, no employee is an insured for:

(1) Bodily injury or personal injury to you or to a co-employee while in the course of his or her employment; or to the spouse, child, parent, brother or sister of that co-employee as a consequence of such bodily injury or personal injury, or for any obligation to share damages with or repay someone else who must pay damages because of the injury;

(2) Bodily injury or personal injury arising out of his or her providing or failing to provide professional health care services; or

(3) Property damage to property owned or occupied by or rented or loaned to that employee, any of your other employees, or any of your partners or members (if you are a partnership or joint venture).

b. Any person (other than your employee), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

Douglas Weigel
October 24, 2004
Page 3

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.

3. With respect to mobile equipment registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:

- a. Bodily injury to a co-employee of the person driving the equipment; or
- b. Property damage to property owned by rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision. No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

It is clear that Meadow Valley, LLC fits into none of the above categories and thus does not fit the definition of an insured under these policy periods. Additionally a review of the policies reveals no endorsements altering the policy to include Meadow Valley, LLC as an additional insured, nor endorsements altering the language of Who is an Insured. Thus under policy periods of 06/24/99 to 06/24/00 and 06/24/00 to 06/24/01 there is no coverage for this matter for Meadow Valley, LLC.

Turning to policy periods 06/24/01 to 06/24/02, 06/24/02 to 06/24/03 and 06/24/03 to 06/24/04 I refer you to page on of the main policy form BP0006 0197 where it reads in pertinent part:

The word "insured" means any person or organization qualifying as such under SECTION C-WHO IS AN INSURED.,

A. COVERAGES

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance does not apply.

I now refer you to endorsement BP7032 1299 where it states in pertinent part:

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS LIABILITY COVERAGE FORM

WHO IS AN INSURED (Paragraph C) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

Douglas Weigel
October 24, 2004
Page 4

As the above indicates, this endorsement provides Additional Insured status for scheduled person's and or corporations. A review of the scheduled corporations reveals that Meadow Valley, LLC is a listed corporation and thus fits the definition of who is an insured.

As with most insurance policies this one includes terms, conditions and exclusions that affect the applicability of coverage. I now direct your attention to page 2 of endorsement BP0009 0197 BUSINESSOWNERS COMMON POLICY CONDITIONS, where it states in pertinent part:

H. OTHER INSURANCE

1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.
2. Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so; but we will be entitled to the insureds rights against all those other insurers.

As this clearly illustrates coverage for Meadow Valley, LLC as an additional insured under this policy of insurance is excess insurance only, and as an excess insurer there is no duty to defend.

I now direct your attention to page 3 of policy form BP0006 0197 where the exclusions to coverage are listed. In particular I bring your attention to the following in pertinent part:

B. EXCLUSIONS

1. Applicable to Business Liability Coverage -

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for

k. Damage to Property

"Property damage" to:

- 5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
 - 6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
- Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.
- Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

Douglas Weigel
 October 24, 2004
 Page 5

l. Damage to Your Product

"Property damage" to "your product" arising out of it or any part of it.

m. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. Damage to Impaired Property or Property

Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

o. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Certain words above in quotation marks hold special meaning within the context of this insurance policy and at this time I direct your attention to page 11 of the main policy form where these words are defined, specifically I bring your attention to the following:

F. LIABILITY AND MEDICAL EXPENSES DEFINITIONS

7. "Impaired Property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement; if such property can be restored to use by:

(1) The repair, replacement, adjustment or removal of "your product" or "your work"; or

(2) Your fulfilling the terms of the contract or agreement.

8. "Insured Contract" means:

a. A contract for a lease of premises.

b. A sidetrack agreement;

Douglas Weigel
October 24, 2004
Page 6

- c. Any easement or license agreement,
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
 - (b) Giving directions or instructions or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection or engineering services.

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Products - Completed Operations Hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or
- (2) Work that has not been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at the job site has been put to its intended use by any other person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; or

Douglas Weigel
October 24, 2004
Page 7

2) The existence of tools, uninstalled equipment or abandoned or unused materials.

15. "Property Damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

18. "Your Product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or
 - (3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

19. "Your Work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

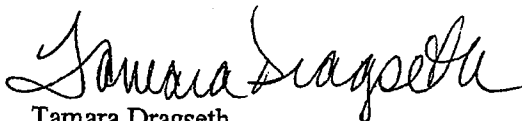
"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

I trust that this letter adequately explains our coverage position in this matter. Should you have any documentation which might materially alter our coverage position, please forward it for our review and we will notify you whether our coverage position alters.

There may be other policy provisions and defenses that may be found to apply to the claims and to the damages sought. Any failure to quote or refer to any specific policy provision in the body of this letter or otherwise, is not a waiver of those provisions and defenses. No action we have taken in the past, now take, or will take in the future is to be deemed a waiver of any of our rights.

Sincerely yours,
AMERICAN ECONOMY INSURANCE COMPANY



Tamara Dragseth
Claims Specialist

Exhibit 2

Copy Received

JAN 10 2005

Williams, Kastner & Gibbs
Seattle

LAW OFFICES
FLOYD & PFLUEGER

A PROFESSIONAL SERVICE CORPORATION

300 TRIANON BUILDING, 2505 THIRD AVENUE
SEATTLE, WA 98121-1446
TEL (206) 441-4455
FAX (206) 441-8484
dwelgel@floyd-pflueger.com

DOUGLAS K. WEIGEL
ALSO ADMITTED IN OREGON

January 7, 2005

RE-TENDER OF DEFENSE

Via Certified Mail & Fax: 425-376-7900

Tamara Dragseth, Claims Specialist
Safeco/American Economy Insurance Company
Special Commercial Liability Claims
P.O. Box 34700
Seattle, WA 98124

RE: *Meadow Valley HOA v. Meadow Valley LLC v. Hebert Construction*
King County Cause No.: 03-2-33931-8 KNT
Your Primary Insured: Interior Motives, Inc.
Claim No: 7406 2315 2015
Your Policy Reference: 02BO781919
Safeco Insurance Policy Nos.: 02BO7819190, 06/24/99-06/24/00
02BO7819192, 06/24/00-06/24/01
02BO7819193, 06/24/01-06/24/02
02BO7819194, 06/24/02-06/24/03

Dear Ms. Dragseth:

Thank you for your October 24, 2004, letter in which Safeco/American Economy acknowledges that Meadow Valley LLC is an additional insured under policies 02BO7819192, 02BO7819193, and 02BO7819194 policies issued to Interior Motives, Inc. In that letter, you indicate that Safeco/American Economy's policies are "excess" when other insurance coverage applies, therefore when Safeco/American States is an excess insurer it does not have a present duty to defend Meadow Valley LLC.

This letter serves as notice to Safeco/American Economy that Meadow Valley LLC's primary insurer for the 2001/02 and 2002/03 policy periods has denied coverage. By letter dated September 22, 2004, St. Paul Travelers informed Meadow Valley LLC that it was no longer defending Meadow Valley LLC under policy number BC0190003 (the "Association Policy"), which was in effect from 4/15/00 through 4/15/03. St. Paul Travelers is defending Meadow Valley LLC as a named insured under a policy issued to Hebert Construction, Inc., policy number KK08400026 (the "Contractors Policy"), which was in effect through 2/4/00. A copy of St. Paul Travelers' September 22, 2004, denial of coverage under the Association Policy is attached hereto.

By letter dated October 11, 2004, Admiral Insurance informed Meadow Valley LLC that it was providing coverage to Meadow Valley LLC as a named insured under policies issued to Hebert Construction, Inc.

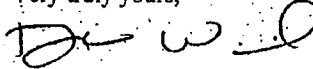
However, coverage is only being provided under a reservation of rights for the 2/4/00 through 2/4/01 policy period (policy number A00AG08147). Coverage was denied for the 2/4/01 through 2/4/02 policy

period because of non-exempted Specified Operations Exclusion. Coverage was denied under the 2/4/02 through 3/1/03 policy period because Meadow Valley LLC was not a named insured under that policy. A copy of Admiral's October 11, 2004, Reservation of Rights letter is attached hereto.

In sum, the only primary coverage currently in effect for Meadow Valley LLC is St. Paul Travelers from 6/19/98 through 2/4/00, and Admiral from 2/4/00 through 2/4/01. The HOA Complaint was not filed until 9/5/03. Accordingly, based on the coverage positions taken by St. Paul Travelers and Admiral Insurance, **Meadow Valley LLC does not have any primary coverage for the period between 2/4/01 and 9/5/03.** Under the terms of Safeco/American Economy's insurance policy, its excess coverage has been triggered, and Meadow Valley LLC hereby retenders its defense to Safeco/American Economy.

Please be advised that a recent mediation in this case was unsuccessful, and that trial is scheduled in King County on March 21, 2005. Please let me know what additional information you need at this time. We look forward to your prompt response.

Very truly yours,



Douglas K. Weigel

Enclosures

cc: Mark Davidson (w/o encl.)
Steve Jager (w/o encl.)
Roger Hebert (w/o encl.)